Supreme Court, U. S.
FILED
DEC 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No. 76-633

AAACON AUTO TRANSPORT, INC.,
Petitioner,

-against-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of JOSEPH ROMAGNOLI,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HELEN FRANCES W. LEHRICH
Attorney for Respondent
60 East 9th Street
New York, New York 10003

WALTER WILLIAMSON, Of Counsel,
WILLIAMSON & WILLIAMSON
225 Broadway
New York, New York 10007
(212) 233-8080

(5904)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

TABLE OF CONTENTS

Page

Questions Presented..... 1

Statement of the Case..... 3

Reasons for Denying the Writ..... 3

Summary of the Argument..... 5

Point I:

The Cummins Amendment, To 49 U.S.C. §20(11), Altered The Statutory Scheme From One Prohibiting Any Exemption From The Statutory Liability, Which Enabled Carriers Within Reason To Limit Their Liabilities, To One Prohibiting "Any Limitation Of Liability", Thus Ensuring That No Limitation Of Any Liability Would Be Lawful Without Express Congressional Approval..... 8

Point II:

The All-Inclusive Statutory Prohibition Against "Any Limitation of Liability" Must Be Construed To Include The Limitation Of Venue In Aaacon's Bill of Lading. 16

Point III:

Aaacon Cannot Distinguish The F.E.L.A. Cases Holding That The Word "Liability" Includes The Exposure To Defend A Claim In A Particular Venue..... 23

TABLE OF CONTENTS

Page

Point IV:

An Express Congressional Purpose of 49 U.S.C. §20(11), Particularly As Amended In 1927, Was To Permit Claims Against Carriers To Be Brought In Venues Convenient To Shippers..... 28

Point V:

The Venue Limitation In Aaacon's Bill of Lading Is Not Only A Limitation Of Aaacon's Liability To Suit In A California Forum But Also Limits Aaacon's Liability To Pay Damages, Thus Creating The Precise Evil Congress Sought To Remedy..... 31

Point VI:

The Fourth Proviso Of 49 U.S.C. §20(11), Part Of The Newton Amendment Of 1927, Was Added To (1) Establish Wider Federal Venue For Shipper Claims Against Carriers Than Was Otherwise Then Available And (2) Set The Outer Perimeter Of The Wider Venue Being Made Available..... 34

TABLE OF CONTENTS

Page

Point VII:

Cases Under The Miller Act And The Admiralty Statutes Do Not Control Here Or Suggest A Result Contrary To The Decision Of The Court Below, Especially Since The Statutory And Common Law Rules Applicable Here Are Far More Protective Of The Shipper, And Since There Is Nothing In Those Cases To Indicate Anything Unfair About The Limited Venue Provisions In The Arbitration Clauses Considered..... 40

Point VIII:

The F.A.A. Clearly Permits The Invalidation Of An Arbitration Clause Under 49 U.S.C. §20(11) or §317(a), Since The Savings Clause Of 9 U.S.C. §2 Provides That Arbitration Clauses Are Subject To The Same Standards As Any Other Contract Provisions. 48

Point IX:

The Tariff Section's Rejection Of Aaacon's Tariff Containing The Very Provisions Here In Issue Rendered Further Use Of The Provisions Unlawful, Since The Rejection Was A Final Agency Determination, Never Appealed..... 53

Conclusion..... 58

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Page

CASES:

Aaacon Auto Transport, Inc. v. Jacobson, 475 F.2d 1394 (3rd Cir. 1973).... 3

B & C Truck Leasing, Inc. v. I.C.C., 283 F.2d 163 (10th Cir. 1960)..... 20

Boston & Maine Railroad v. Piper, 246 U.S. 439, 38 S.Ct. 354, 62 L. Ed. 820 (1918)..... 55

Boyd v. Grand Trunk W. R. Co., 338 U.S. 263, 70 S.Ct. 26, 94 L. Ed. 55 (1949).....17, 21, 23, 25, 26, 27, 28

Clark v. Lowden, 48 F.Supp. 261 (D.C. Minn. 1942)..... 26

Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., 188 F.2d 343 (6th Cir. 1951)..... 15

Duncan v. Thompson, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 475 (1942).....20, 21

Greyhound Lines, Inc. v. U.S., 1967 Federal Carriers Cases ¶81, 928 (D.C. Ill. 1967)..... 55

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)..... 51

Herrington v. Thompson, 61 F.Supp. 903 (D.C. Mo. 1945)..... 26

TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES

Page

I.C.C. v. Interstate Auto Shippers, Inc., 214 F.Supp. 473, aff'd, 323 F.2d 367 (2d Cir. 1963)..... 21

Indussa Corp. v. S/S Ranborg, 377 F.2d 200 (2d Cir. 1967)....44, 45, 46

Krenger v. Pennsylvania R. Co., 174 F.2d 556 (2d Cir.), cert. denied, 338 U.S. 866, 70 S.Ct. 140, 94 L.Ed. 531 (1949).....17, 18, 21, 23, 25, 27, 28

Kurt Orban Co. v. S/S Clymenia, 318 F.Supp. 1387 (S.D.N.Y. 1970)..... 44

Litvak Meat Co. v. Baker, 446 F.2d 329 (10th Cir. 1971)..... 38

Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U.S. 501, 30 S.Ct. 184, 54 L.Ed. 690 (1910)..... 36

Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U.S. 657, 33 S.Ct. 397, 57 L.Ed. 690 (1913).....13, 15

National Equipment Rental v. Szukhent, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed. 2d 354 (1964)..... 47

New York Central Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 21 L.Ed. 627 (1873).....13, 44, 47

Pratt v. Denver & R. G. W. R. Co., 284 F. 1007 (D.C. Minn. 1922)..... 38

TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES

Page

Swift Industries, Inc. v. Botany Industries, 297 F.Supp. 1056 (W.D. Pa. 1969)..... 50

Texas Constr. Co. v. U.S., 236 F.2d 138 (5th Cir. 1956)..... 42

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).....46, 47

U.S. v. Eric Elevator Corp., 214 F.Supp. 947 (D.C. Mass. 1963)..... 42

W.D. Lawson & Co. v. Penn Central, 456 F.2d 419 (6th Cir. 1972).....37, 38

STATUTES:

9 U.S.C. §1..... 27

9 U.S.C. §2.....44, 46, 48

9 U.S.C. §4.....48, 50, 52

28 U.S.C. §1337..... 50

28 U.S.C. §1391(b)..... 50

28 U.S.C. §1404(a)..... 52

28 U.S.C. §1406(a)..... 50

40 U.S.C. §270(b)..... 42

45 U.S.C. §55..... 17

TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES

Page

45 U.S.C. §56..... 17

46 U.S.C. §190..... 43

49 U.S.C. §20(11)....2, 5, 6, 7, 8, 9, 12, 14, 15, 19, 20, 24, 27, 28, 29, 30, 32, 33, 34, 35, 38, 39, 42, 43, 48, 52, 57

Carmack Amendment (1906)...7, 9, 10, 11, 12, 13, 29, 32

Cummins Amendment (1915)... 5, 7, 9, 10, 11, 13, 14

Newton Amendment (1927)...7, 14, 29, 32, 34, 36, 38, 39

49 U.S.C. §316(b).....8, 57

49 U.S.C. §317(a)....2, 8, 48, 53, 54, 56

49 U.S.C. §319..... 39

Act of Sept. 19, 1922, ch. 345, 42 Stat. 849..... 36

Carriage of Goods by Sea Act (COGSA).....43, 45

Federal Arbitration Act (F.A.A.)...27, 48

Federal Employers' Liability Act (FELA).....17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 36

Harter Act..... 43

TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES

Page

Interstate Commerce Act....14, 19, 26, 27

Miller Act.....40, 41, 42

INTERSTATE COMMERCE COMMISSION DECISIONS:

Aaacon Auto Transport, Inc., Investigation and Revocation of Certificate, 124 M.C.C. 493 (1976)..... 54

Ex Parte 263, 340 I.C.C. 515 (1972)..... 47

Louisiana State Rice Milling Co. v. M.L. & T.R.R.& S.S. Co., 34 I.C.C. 511 (1915)..... 15

TREATISES:

Davis, Administrative Law Treatise §18,07, p. 594-5 (1958)..... 56

1 Knorst, Interstate Commerce Law and Practice, 102 (1953)..... 14

1 Moore §0.60[5], p. 611 (1975)..... 56

7 Moore §60.25[2], p. 301-6 (1975).... 56

LEGISLATIVE HISTORY:

40 Cong. Rec. 9580 (1906)..... 32

67 Cong. Rec. 12757 (1926).....30, 33, 35

TABLE OF CASES, STATUTES,
AND OTHER AUTHORITIES

Page

67 Cong. Rec. 12758-9 (1926)..... 35

67 Cong. Rec. 12763-4 (1926)...30, 32, 35

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-633

AAACON AUTO TRANSPORT, INC.,

Petitioner,

-against-

STATE FARM MUTUAL INSURANCE COMPANY,
as subrogee of JOSEPH ROMAGNOLI,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED

1. Is the limitation of venue solely to New York City in which Aaacon is liable to defend the shipper's claim a limitation

of liability, by definition, that is consequently "unlawful and void" under the all-inclusive prohibition in 49 U.S.C. §20(11) against "any limitation of liability" in any "bill of lading"?

2. In view of the size and type of claim likely to arise under Aaacon's bill of lading, does the New York venue limitation in Aaacon's arbitration clause enable Aaacon to limit its liability to pay damages, also prohibited under 49 U.S.C. §20(11), by erecting significant impediments to the prosecution of the out-of-state shipper's claim?

3. Did the rejection letter signed by James A. McCarthy, Chief of the Section of Tariffs of the I.C.C., rejecting Aaacon's tariff containing the arbitration and limited venue provisions here in issue, constitute a final act of the Commission by duly constituted authority, rendering "unlawful", under 49 U.S.C. §317(a), any further use of

these provisions by Aaacon?

STATEMENT OF THE CASE

The major relevant facts of the case are as reported by the Court of Appeals (14a-15a*).

REASONS FOR DENYING THE WRIT

There is no conflict among the Circuits on the issues dealt with in this case. Indeed, there is no published decision involving Aaacon by any Court of Appeals other than that of the Second Circuit panel here. Moreover, the unpublished decision by the Third Circuit in Aaacon Auto Transport, Inc. v. Jacobson, 475 F.2d 1394 (3rd Cir. 1973), obviously does not consider any of the issues resolved here. (28a-29a, 39a, 40a-41a.)

*Numbers in parentheses refer to pages in the petition.

In addition, it is unlikely that any conflicts will develop. There are no reported decisions indicating that any other common carriers are attempting to insert venue limitations in their bills of lading; and there are no decisions, other than lower court cases involving Aaacon's attempts to exploit its own arbitration clause, holding any such limitations valid.

Finally, the Court of Appeals' decision is completely authoritative. Its analysis of the statutory language and relevant legislative history is precise and correct; its treatment of Aaacon's arbitration clause is completely in accord with that of the Interstate Commerce Commission; and its holding is in complete harmony with settled decisional law under analogous statutes.

Every argument presented by Aaacon in its petition here was presented below in its brief, in its petition for rehearing

en banc, and in numerous submissions to the court by informal correspondence and motion. Every argument was rebutted in detail. The appellate record thus created constitutes hundreds of pages of written argument. The court's opinion obviously could not discuss every irrelevant or unsupported argument presented by Aaacon, nor can we in this brief. However, it is clear that the Court of Appeals' decision was absolutely correct on the merits.

SUMMARY OF THE ARGUMENT

49 U.S.C. §20(11), as amended in 1915, prohibits, not merely limitations of liability imposed by the statute, but any limitation of liability in any manner or form whatsoever in any bill of lading, except as expressly provided for in several provisos to §20(11). The exposure to defend a claim in a particular venue is a

liability as that word has been clearly understood in the previous decisions of this Court and the Court of Appeals. The limitation to New York City of the venue in which Aaacon is liable to defend the shipper's claim is, therefore, a limitation of liability by definition. Consequently, it is prohibited under 49 U.S.C. §20(11).

Moreover, the liability of carriers such as Aaacon to defend a claim in a venue of the shipper's choice, so long as the carrier was transporting motor vehicles there, is a liability clearly intended by the draftsmen of §20(11).

The venue limitation also enables Aaacon to limit or avoid its liability to pay damages on claims such as this shipper's, because the expense, inconvenience, and prejudice inherent in prosecuting such claims in a venue far from the necessary witnesses make prosecution of the claim

uneconomical. This is the very evil Congress was seeking to remedy in initially enacting 49 U.S.C. §20(11) in 1906 and amending it in 1927.

The effect of the 1915 amendment to 49 U.S.C. §20(11) was to insure that no clauses limiting any carrier liability could be inserted in a bill of lading without express Congressional approval.

It is thus apparent that the provisions in the carrier's bill of lading here at issue violate the plain meaning of the statute, frustrate the express Congressional intent, and contravene the statutory scheme of regulation.

The rejection, over the signature of James A. McCarthy, Chief of the Tariff Section of the I.C.C., of Aaacon's tariff containing the provisions for arbitration in New York City, was a final act of the Commission. Further use by Aaacon of the offending provisions was therefore unlawful

under 49 U.S.C. §317(a). Moreover, the rejection was on the ground that the provisions violated 49 U.S.C. §§20(11) and 316(b). Aacon never challenged or appealed the rejection. Aacon is therefore now estopped from litigating in the courts the validity of the offending provisions under those sections of the statute.

POINT I

THE CUMMINS AMENDMENT TO 49 U.S.C. §20(11), ALTERED THE STATUTORY SCHEME FROM ONE PROHIBITING ANY EXEMPTION FROM THE STATUTORY LIABILITY, WHICH ENABLED CARRIERS WITHIN REASON TO LIMIT THEIR LIABILITIES, TO ONE PROHIBITING "ANY LIMITATION OF LIABILITY", THUS ENSURING THAT NO LIMITATION OF ANY LIABILITY WOULD BE LAWFUL WITHOUT EXPRESS CONGRESSIONAL APPROVAL.

Aacon argues that the only liability imposed by §20(11) was the liability to pay damages for the full loss caused to property in transport, that is seeking to limit the venue liability it would otherwise

have.

Moreover, comparison of the 1915 amendment to 49 U.S.C. §20(11) with the original language of the statute demonstrates that one of the express effects of the amendment was to prohibit unequivocally, not merely any limitation of liability imposed by the statute, but any limitation of liability of any kind, whether or not the liability sought to be limited is created by the statute or exists apart from the statute. Thus, the only restrictions on carrier liability, of any kind, permitted after 1915 are those expressly provided for in several provisos to the statute added in 1915 and thereafter.

The Carmack Amendment, which added §20(11) to the Commerce Act in 1906, simply stated:

> That any common carrier...receiving property for transportation [in interstate commerce]...shall be liable...for any loss, damage,

> or injury to such property caused by it or by any [connecting carrier]..., and no contract, receipt, rule, or regulation shall exempt such common carrier...from the liability hereby imposed...[Emphasis added]

The First Cummins Amendment added the following significant language in 1915:

> ...And any such common carrier... shall be liable...for the full actual loss, damage, or injury to such property caused by it or by any [connecting carrier]..., notwithstanding any limitation of liability or limitation of the amount of recovery...; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void...[Emphasis added]

Congress thus drew a clear distinction between the phrase "the liability hereby imposed" (Carmack Amendment) and the phrase "any limitation of liability" (Cummins Amendment). The phrase "any limitation of liability" in the Cummins Amendment does not read any limitation of "the liability hereby imposed". Moreover, in view of the disjunctive phrase "or limitation of the

amount of recovery", Congress clearly intended the word "liability" to have a broader connotation than mere liability for damages.

The operative language in the Cummins Amendment is, "any such limitation, without respect to the manner or form in which it is sought to be made is...unlawful and void". The antecedent of the phrase "any such limitation" is clearly "any limitation of liability or limitation of the amount of recovery", not the phrase "the liability hereby imposed".

The conclusion is inescapable, therefore, that, although the Carmack Amendment prohibited only contracts that "shall exempt...from the liability hereby imposed", the Cummins Amendment prohibits all contractual limitations of liability whether the liability be imposed by the statute or otherwise exists.

The approach of the statute was thus

changed in 1915 from a statutory scheme prohibiting any exemption from the statutory liability, which enabled carriers to limit their common-law liabilities contractually if the limitations were reasonable, to a statutory scheme broadly prohibiting "any limitation of liability", leaving it to Congress to designate what contractual limitations of liability, if any, would thenceforth be permitted the carriers. Thus, beginning in 1915 with the First Cummins Amendment, Congress took pains to provide for and regulate, in the several provisos to §20(11), any conditions precedent such as notices of claim and contractual statutes of limitation and any other limitations thought proper.

The precise effect of this clear change in the Congressional approach to the problem was to put an end to litigation over whether particular contractual limitations of liability imposed by carriers were just and

reasonable. Such litigation persisted after the passage of the Carmack Amendment, which imported into the statute the common law rules of liability, since under the common law a contractual limitation imposed by a carrier was acceptable if not deemed unreasonable. Missouri, Kansas & Texas Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913); cf [New York Central] Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 379-80 (1873). The Cummins Amendment, it should be noted, did not merely prohibit those limitations of liability that had been permitted by court rule in the post-Carmack era. It embraced all limitations of liability, clearly intending to preclude further judge-made exceptions.

We know of no authority after the First Cummins Amendment that permits any limitation of liability unless specifically provided for in one of the provisos to the statute.

Contrary to Aaacon's assertion (14-15), Knorst does not say that "all" that the Cummins Amendment did was to abolish the system of released rates. Rather, he noted that it "nullified provisions limiting liability contained in public tariffs and in bills of lading", thus accomplishing that effect. 1 Knorst, Interstate Commerce Law & Practice 102 (1953). Nowhere does he purport to discuss what other limitations, if any, whether or not imposed by the statute, might no longer be limited by carriers after 1915. Nor does any other authority cited by Aaacon discuss this issue.

In light of the foregoing, it is evident that the cases under the Commerce Act cited by Aaacon at 9-12 and 14-18 cannot enable it to evade the reach of §20(11) as it has existed since the Cummins Amendment of 1915 and the Newton Amendment of 1927.

Thus, all of those authorities cited in support of what liabilities the statute

imposes are not apposite since after 1915 the statute prohibits any limitation of liability whether or not imposed by the statute, unless expressly provided for in the provisos.

Similarly, any case prior to 1915 permitting a condition precedent or other limitation of liability, e.g., Missouri, Kansas and Texas Ry. Co. v. Harriman, 227 U.S. 657, is inapplicable because reasonable contractual limitations of liability were not prohibited until 1915. And any case cited after 1915 enforcing a condition precedent to litigation, e.g., Delphi Frosted Foods Corp. v. Illinois Cent. R. Co., 188 F. 2d 343 (6th Cir. 1951), or other limitation of liability, will be observed to enforce a limitation expressly provided for in the provisos to §20(11). (Louisiana State Rice Milling Co. v. M.L. & T.R.R. & S.S. Co., 34 I.C.C. 511 (1915), may also be distinguished on the ground that the

Commission concluded it was not dealing with a limitation of liability at all, the carrier not being required under any rule of law to check merchandise loaded by the shipper itself at the shipper's own facilities.)

POINT II

THE ALL-INCLUSIVE STATUTORY PROHIBITION AGAINST "ANY LIMITATION OF LIABILITY" MUST BE CONSTRUED TO INCLUDE THE LIMITATION OF VENUE IN AAACON'S BILL OF LADING.

The question then resolves to this one: does the all-inclusive statutory prohibition against contractual limitations of "liability" proscribe not merely a limitation of the amount of damages recoverable, but also a limitation of the carrier's venue exposure? The Court of Appeals answered this question in the affirmative (18a-23a).

This conclusion was inevitable, in

view of the well-established broad meaning in law of the word "liability". Both this Court and the Court of Appeals had already given the word "liability" precisely that broad construction, holding that, under the Federal Employers' Liability Act, 45 U.S.C. §§55 and 56 (FELA §§5 and 6), a carrier's exposure to suit in a particular venue is indeed a "liability" as that word must be understood. Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949); Krenger v. Pennsylvania R. Co., 174 F.2d 556 (2d Cir.), cert. denied 338 U.S. 866 (1949).

As the Court of Appeals held in Krenger (174 F.2d at 559):

> Under the analysis of Professor Hohfeld of the American Law Institute, liability is quite differentiated from a mere duty to pay damages.... Thus the railroad was contracting against its liability to be sued, i.e., to have its legal relations changed -- adversely -- in any one of several jurisdictions, in order to obtain immunity from such change except under the favoring conditions of a single chosen

jurisdiction.

Aaacon's bill of lading obviously constitutes just such an attempt to "obtain immunity" from the "liability" "to have its legal relations changed -- adversely -- in any one of several jurisdictions...except under the favoring conditions of a single chosen jurisdiction".

The Krenger decision's reliance on Hohfeldian analysis, incidentally, makes clear that, even in the statutory context of that case, the holding that the word "liability" includes the exposure to suit in a particular forum does not depend on the existence of venue provisions in FELA §6. The significance of the venue provisions in §6 of the FELA is not that they endow the term "liability" with a meaning it would otherwise not have. Rather, the importance of the venue provisions in the FELA was that the Act proscribed only exemptions from liabilities created by the

Act. FELA §5. Therefore, if the Act had not provided that the carrier could be sued in a jurisdiction where it was doing business, the contractual limitation of venue, though an exemption from a liability, would not have been an exemption from a liability created by the Act. Clearly, however, in order to determine whether the exposure to suit in the venue provided for in the Act was a "liability" created by the Act, the courts first had to determine whether the exposure to suit in a particular venue was a "liability" at all, as that word is defined.

§20(11) of the Commerce Act, it should be noted, does not merely prohibit limitations of liabilities created by that Act. (As shown in Point VI, infra, however, liability to suit in a federal venue through or into which Aaacon is transporting motor vehicles is a liability expressly created by §20(11)). Rather, §20(11), in the most

inclusive language possible, prohibits "any limitation of liability" regardless of its "manner or form". Unlike the FELA, therefore, §20(11) of the Commerce Act proscribes all limitations of liability, of any kind, whether or not the liability sought to be limited is created by the statute or exists apart from the statute. As the court stated in Krenger, "[s]ignificance should be attached to the inclusive nature of the statutory phrase -- any liability...." 174 F.2d at 558. See Point I, supra.

Duncan v. Thompson, 315 U.S. 1 (1942), also demonstrates that the word "liability" will be given its broadest possible significance, especially when used in a remedial statute. In this regard, it is significant to remember that "[t]he [Interstate Commerce] Act is highly remedial in nature; and in order to effectuate its purposes in the public interest, it is to be liberally construed." B & C Truck Leasing, Inc. v.

I.C.C., 283 F.2d 163, 164 (10th Cir. 1960); I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473, aff'd, 323 F.2d 367 (2d Cir. 1963).

It should be noted that the venue restrictions considered in Boyd and Krenger were held to be exemptions from liability notwithstanding the absence of any limitation in the contracts at issue on the amount of recoverable damages. See also Duncan v. Thompson, 315 U.S. 1 (1942).

Further, it should be noted that the venue restrictions considered in Boyd and Krenger were held to be exemptions from liability notwithstanding the fact that the venues to which the contracts restricted the claimants were not inconvenient to them or otherwise inappropriate. Thus, under the contracts in Boyd and Krenger, the defendants would still have been liable to suit in jurisdictions where the claimants resided or where the accidents occurred.

Nevertheless, both the Supreme Court and the Court of Appeals disregarded the question of whether available forums under the contract were convenient to the claimants or otherwise appropriate. Rather, they focused straight on the heart of the issue -- whether a limitation of possible venue was the limitation of a liability per se.

The point emphasized by both courts was that the attempt to achieve immunity from liability to suit in an otherwise available venue is an attempt to avoid a "liability" as that word must be understood. Under the analysis of both courts, therefore, it would be immaterial whether or not the contractually limited venue was convenient to the claimant or otherwise appropriate.

In light of the foregoing analysis, there can be no question that Aaacon's attempt to limit its liability to defend the shipper's claim exclusively to a New

York City venue, when it would otherwise be liable to defend the claim in California, is clearly a limitation of liability within the meaning of the word "liability" used in §20(11).

POINT III

AAACON CANNOT DISTINGUISH THE F.E.L.A. CASES HOLDING THAT THE WORD "LIABILITY" INCLUDES THE EXPOSURE TO DEFEND A CLAIM IN A PARTICULAR VENUE.

Aaacon can hardly contest the proposition that the exposure to suit in a particular venue is a liability as that word must be understood in the law. See Point II, supra. Rather, Aaacon attempts to argue that such a definition of the word liability should not be applied to 20(11) since the FELA cases dealing with venue limitations, Boyd v. Grand Trunk W. R. Co., 338 U.S. 263 (1949), and Krenger v. Pennsylvania R. Co., 174 F.2d 556 (2d Cir.) cert. denied 338 U.S. 866 (1949), Point II, supra, expressly

recognizing the broad meaning in law of the word liability, deal with a statute containing "vital differences" from §20(11). (21-24.)

Even if there were vital differences, that could not prevent application to §20(11) of a properly broad definition of the word liability, since the statute is highly remedial. See Point II, supra, and Points IV-V, infra.

But Aaacon's assertion that there are "vital differences" is false.

Thus, Aaacon asserts that the FELA by its terms expands venue while §20(11) restricts it (21-22). To the contrary, §20(11) by its terms expands venue on suits against delivering carriers almost to the same extent as does the FELA. See Point VI, infra. Moreover, as with the FELA, the purpose of §20(11) and the importance of affording extensive venue to the class sought to be protected - shippers - was no

secret. See Points IV-V, infra.

Again, Aaacon asserts that "specific language of the FELA...protects against waiver of 'any provisions of the chapter', including those venue expansive provisions" of the FELA (22). There is no such "specific language" in the FELA. To the contrary, the FELA only prohibits exemptions from any liability created by the Act. FELA §5. The statute does not say that the exposure to suit in a particular venue is a liability, or that the word liability means more than the duty to pay damages. Those are propositions that had to be established by case law, based on a properly broad definition of the meaning of the word liability. The Congressional history gave no guidance on the meaning of the word. In fact, many cases prior to Boyd and Krenger, supra Point II, had held that the word liability did not and was not intended to encompass the exposure to suit

in particular venues, and that a contractual limitation of venue was not prohibited by FELA §5. See, e.g., Herrington v. Thompson, 61 F. Supp. 903 (D.C. Mo. 1945), Clark v. Lowden, 48 F. Supp. 261 (D.C. Minn. 1942) and other cases cited in Boyd at 338 U.S. 263, 264 at n. 3. The only difference between the "specific language" of the two statutes regarding limitations of liability is that the Commerce Act prohibition is broader. See Points I-II, supra. This difference favors the shipper here, not Aaacon.

Aaacon also asserts that the "Interstate Commerce Act does not limit lawful restrictions on litigation" (22; emphasis added). Neither does the FELA. The question is what is lawful.

Further, the carrier asserts that, unlike the FELA, the "Interstate Commerce Act by its terms specifically maintains the rights and liabilities of the parties

at common law" (22). To the contrary, like the FELA the Commerce Act creates new substantive rights and liabilities. §20(11) clearly alters the liabilities of initial and delivering carriers (see Points IV and VI, infra) and prohibits the limitation of liabilities that the carrier might have been permitted to limit by contract at common law (Point I, supra).

Finally, Aaacon asserts that the FELA differs from §20(11) in that "arbitration of employees rights was specifically exempted from...9 U.S. Code Sec. 1." (22; emphasis added). Not quite true. Arbitration agreements in "contracts of employment" of railroad employees were excepted in 9 U.S.C. §1. There is nothing in the cases under the F.A.A. to indicate that the contracts involved in Boyd and Krenger (supra Point II), entered into by employees after they were injured, would be considered "contracts of employment".

But even if the carrier's assertion were true, so what? The analysis in Boyd and Krenger clearly suggests that an agreement by an employee, limiting him to presenting the type of claim envisioned by the FELA solely to arbitration in a single city, would have been defined as a limitation of the liabilities created by the FELA in §6 just as were the agreements actually at issue in those cases. That analysis is precisely applicable at bar, as the Court of Appeals clearly recognized (22a-23a).

POINT IV

AN EXPRESS CONGRESSIONAL PURPOSE OF 49 U.S.C. §20(11), PARTICULARLY AS AMENDED IN 1927, WAS TO PERMIT CLAIMS AGAINST CARRIERS TO BE BROUGHT IN VENUES CONVENIENT TO SHIPPERS.

Aaacon implies that the intent underlying the liability imposed by 49 U.S.C. §20(11) was simply to eliminate the

existing burden on shippers to prove which of several connecting carriers was responsible for damage to cargo (12-14).

The legislative history refutes this argument. As recognized by the Court of Appeals, one of the expressly stated reasons was, not merely to ease a difficult burden of proof, but to enable shippers to bring their property damage claims in venues convenient to the shipper (19a-20a).

In attempting to achieve the above-stated goal, among others, the Carmack Amendment of 1906, which added §20(11) to the Interstate Commerce Act, made the initial carrier receiving property for transport liable to the shipper for losses caused by connecting carriers. But as Congressman Newton noted, discussing the 1927 amendment to §20(11) that bears his name, the Carmack Amendment in practice proved insufficient in most cases, despite its drafters' expressed good intentions, to

provide shippers or consignees with venue in their own states on property damage claims, 67 Cong. Rec. 12757 (1926). (See also 21a-22a.) Accordingly, on behalf of the drafting committee Congressman Newton stated:

> The committee therefore felt that the shipper should also have the right to proceed against the delivering carrier to the same extent that he now has to proceed against the initial carrier [67 Cong. Rec. 12757 (1926)]. [This right] will be of real worth and value to shippers... because suit may be brought by the consignee in a jurisdiction which in almost every instance will be in his own county and state...[67 Cong. Rec. 12764 (1926); emphasis added].

In view of the fact that Congress expressly amended §20(11), two decades after it was enacted, for the explicit purpose of providing even more convenient venue for shippers, the legislative intent regarding venue could not be more clear. The bill of lading of the carrier at bar, Aaacon, which is both the initial and the

delivering carrier, in limiting venue on shipper claims solely to New York City, clearly frustrates this explicit Congressional purpose.

POINT V

THE VENUE LIMITATION IN AAACON'S BILL OF LADING IS NOT ONLY A LIMITATION OF AAACON'S LIABILITY TO SUIT IN A CALIFORNIA FORUM BUT ALSO LIMITS AAACON'S LIABILITY TO PAY DAMAGES, THUS CREATING THE PRECISE EVIL CONGRESS SOUGHT TO REMEDY.

As the Court of Appeals recognized, the venue limitation in Aaacon's bill of lading, requiring shippers across the country to prosecute their small claims against Aaacon only in New York City, clearly enables the carrier to limit its liability to pay damages on these claims. (13a, 24a, 30a-31a, 34a-35a.) In its petition here, Aaacon does not even contest this holding. Consequently, there is little that need be written about it, although a great deal

was written about this point below.

However, it should be noted that the inevitable limitation on the carrier's liability for damages, created by venue inconvenient to shippers, was one of the precise evils Congress was seeking to remedy in enacting and amending 49 U.S.C. §20(11).

As Congressman Richardson stated in discussing the Carmack Amendment of 1906:

> When a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. [40 Cong. Rec. 9580 (1906); emphasis added]

And as Congressman Newton said in expressing the reason for the Amendment of 1927:

> In most cases [suit against the initial carrier must be brought] outside the State of the party plaintiff or consignee. This means additional expense in the commencing and prosecution of the suit, especially as to witnesses. Oftentimes some carriers

> take advantage of this fact and either refuse or delay settlement of the claim. [67 Cong. Rec. 12757 (1926); emphasis added.]

These comments are striking evidence of the continuing recognition by Congress of the necessity to ensure convenient venue for shippers on §20(11) claims in order to prevent the inevitable limitation of the carrier's liability for damages created by venue inconvenient to the shipper. Obviously, in imposing a New York City venue on all of Aaacon's customers, no matter where they may live or may have dealt with Aaacon, Aaacon's bill of lading clearly creates this precise evil, with which Congress was manifestly concerned.

POINT VI

THE FOURTH PROVISO OF 49 U.S.C. §20(11), PART OF THE NEWTON AMENDMENT OF 1927, WAS ADDED TO (1) ESTABLISH WIDER FEDERAL VENUE FOR SHIPPER CLAIMS AGAINST CARRIERS THAN WAS OTHERWISE THEN AVAILABLE AND (2) SET THE OUTER PERIMETER OF THE WIDER VENUE BEING MADE AVAILABLE.

Despite the manifest intentions of Congress above demonstrated, and the actual effect of §20(11), Aaacon argues that the statute "restricts the venue of shipper claims" (8, 13-14, 18-21, 24, 42). The authorities cited make clear that Aaacon is relying on the fourth proviso to §20(11), part of the Newton Amendment of 1927.

The misleading nature of this argument in the present context, and the inapplicability of the cases cited by Aaacon on this issue, will be apparent from the following analysis.

When the Newton Amendment was being considered, the carriers objected that

making delivering carriers liable for losses caused by connecting carriers would render them liable to suit in <u>too</u> wide a range of venues. The compromise arrived at is reflected in the fourth and sixth provisos of §20(11). [Cong. Rec. 12757, 12758-9 and 12763-4 (1926).]

As the provisos read, the compromise makes the line-haul delivering rail carrier liable to suit in any federal district court in a district through or into which the carrier operates a line of railroad. Despite the use of the word "only" in the fourth proviso - which indicates the compromise, the boundary being set - <u>this venue liability constituted a tremendous expansion of the federal venue liability of a delivering carrier under the law then otherwise existing</u>. <u>General federal venue was not then available anywhere a corporation was doing business</u>. Venue was only proper under the contemporary general venue

statute in the state where the corporation was an "inhabitant", defined by case law as solely the state of incorporation. Act of Sept. 19, 1922, ch. 345, 42 Stat. 849; Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U.S. 501 (1910).

Thus, the inclusion of the language in the fourth proviso that a shipper might sue a delivering carrier in any jurisdiction in which it operated a line, like the inclusion in §6 of the FELA of the provision that a claimant could sue a carrier anywhere the carrier was doing business, was the creation of a liability to suit in a federal venue not previously permitted.

The fourth proviso establishes a range of state venue on suits against delivering carriers identical to that being made affirmatively available for the first time in federal court. This boundary, however, was part of the overall legislative package put together in the 1927 Amendment

that created the substantive liability of delivering carriers in the first place. The purpose and the actual effect of imposing that liability, as noted in Point IV, supra, was unquestionably to increase the venues available to shippers in both state as well as federal suits, since delivering carriers were not previously liable to suit for losses not occurring on their lines.

Thus, with respect to both federal venue, expressly created by the Newton Amendment, as well as state venue, on claims against delivering carriers, the fourth proviso limits venue only in the sense that it demarcated the outer boundary of the actual and intentional venue expansion being afforded to shippers by the Amendment and not in the sense that it narrowed venue previously available.

Accordingly, the cases cited by Aaacon dealing with the fourth proviso, W.D. Lawson & Co. v. Penn Central, 456 F.2d 419 (6th

Cir. 1972), and Litvak Meat Co. v. Baker, 446 F.2d 239 (10th Cir. 1971), are not apposite. They hold only that the shipper cannot go beyond the venue range envisioned by Congress in 1927 for §20(11) suits against delivering carriers. They do not deal with the situation here, a carrier attempt by contract to narrow the venue area envisioned by Congress. In fact, one of the cases cited by the carrier suggests that the wide range of venue envisioned by Congress for §20(11) claims should be respected as against attempts to narrow it. W.D. Lawson & Co. v. Penn Central, 456 F.2d 419, 424 (6th Cir. 1972).

Pratt v. Denver & R.G.W.R. Co., 284 F. 1007 (D.C. Minn. 1922), decided prior to the Newton Amendment, also deals only with a suit brought outside the venue area envisioned by Congress.

None of these cases, therefore, can support the argument that the drafters of

§20(11), as created in 1906 and amended in 1927, intended or effected a narrowing of the venues then available for shipper suits against carriers. Such an argument must be rejected as directly contrary to the actual effect of the statute and the expressed intention of Congress.

It is not the court below that has "overridden" the "balance" created by Congress, as alleged by Aaacon (21). Under the "balance" created by Congress, strongly favoring the shipper, Aaacon, which is both an initial and a delivering carrier, would be liable to defend a claim under §20(11) in any jurisdiction through or into which Aaacon is transporting motor vehicles or in which Aaacon is otherwise doing business. (19a-22a, 24a. See also 49 U.S.C. §319.) The decision of the court below does not render Aaacon liable to defend a claim in any venue not contemplated by the draftsmen of §20(11). But Aaacon's bill of lading,

limiting its liability to defend claims solely to New York City, drastically restricts the available venue contemplated by Congress. Consequently, it is Aaacon's bill of lading, not the decision of the court below, that upsets the balance struck by Congress. The decision of the Court of Appeals restores that balance to precisely what the legislature intended.

POINT VII

CASES UNDER THE MILLER ACT AND THE ADMIRALTY STATUTES DO NOT CONTROL HERE OR SUGGEST A RESULT CONTRARY TO THE DECISION OF THE COURT BELOW, ESPECIALLY SINCE THE STATUTORY AND COMMON LAW RULES APPLICABLE HERE ARE FAR MORE PROTECTIVE OF THE SHIPPER, AND SINCE THERE IS NOTHING IN THOSE CASES TO INDICATE ANYTHING UNFAIR ABOUT THE LIMITED VENUE PROVISIONS IN THE ARBITRATION CLAUSES CONSIDERED.

Aaacon next claims that its arbitration clause is lawful because arbitration clauses with venue limitations have been

enforced under the Miller Act and under admiralty statutes (25-31).

It is, of course, not relevant whether such clauses have survived under other statutes if they are unlawful under the Commerce Act or under common law rules applicable to interstate common carriers in their dealings with consumer shippers.

Moreover, examination of the Miller Act and the admiralty statutes and the cases under them cited by Aaacon demonstrates that they cannot help salvage Aaacon's arbitration clause. There is nothing in those cases, which deal with different types of parties, different facts, different laws, to indicate that any arbitration or venue clauses considered were in any way unfair or inappropriate or affected any prohibited limitation of liability; indeed, none of the issues raised here were even litigated by analogy in any of those cases.

The Miller Act contains no provision

prohibiting any contractual limitation of liability. Hence, the parties are free to limit their liabilities by contract, in contrast to the all-embracing prohibition against such limitations contained in 49 U.S.C. §20(11) (Point I, supra). Further, neither the Miller Act nor the admiralty statutes cited were enacted to provide convenient venue for prospective plaintiffs, in contrast to §20(11) (Points IV-VI, supra). Indeed, the Miller Act provision regarding venue (40 U.S.C. §270(b), cited at 25) is there to protect the prospective defendants. Texas Constr. Co. v. U.S., 236 F.2d 138, 143 (5th Cir. 1956). In contrast, the fourth proviso of §20(11) was enacted specifically to expand the federal venues for shippers otherwise available in 1927 (Point VI, supra). Finally, the Miller Act case cited, U.S. v. Eric Elevator Corp., 214 F. Supp. 947 (D.C. Mass. 1963) (26), deals with a contract between two business

corporations, and neither raises nor resolves any of the issues here.

Neither 46 U.S.C. §190, the Harter Act, nor §1303(8), COGSA, contain a prohibition against limitations of liability as sweeping as that in 49 U.S.C. §20(11). Both the Harter Act and COGSA prohibit only limitations of specified liabilities imposed by the respective statutes. In contrast, 49 U.S.C. §20(11) prohibits any limitation of liability (Point I, supra). Further, neither the Harter Act nor COGSA were enacted to provide convenient venues for cargo interests, and neither establishes any venue liability. The contrast with 49 U.S.C. §20(11) is plain (Points IV-VI, supra). Moreover, the admiralty cases involve corporate plaintiffs, a class requiring somewhat less protection than consumers. Still again, contracts of common carriers at common law are subject to fiduciary-like standards and must be fair and reasonable,

regardless of what the shipper signs. [New York Central] Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 379-80 (1873).

The statutory and common law standards applicable to the question of the validity of the arbitration clause at bar are therefore far more favorable to the shipper here than those applicable to the clauses in the admiralty cases cited by Aaacon, e.g., Indussa Corp. v. S/S Ranborg, 377 F.2d 200 (2nd Cir. 1967), and Kurt Orban Co. v. S/S Clymenia, 318 F. Supp. 1387 (S.D.N.Y. 1970).

Aaacon implies, despite all the above, that in view of Indussa, supra, contract provisions requiring arbitration at an inappropriate venue must be validated even if the venue selection would be void if it were not in an arbitration clause (27-28). No case so holds, and certainly not Indussa. (23a-24a). The rule would have to be to the contrary, since 9 U.S.C. §2 specifically states in the savings clause that the validity

of arbitration clauses must be judged by the same, not different, standards as those applicable to any other contract provisions.

Aaacon's reliance on Indussa is based on dictum in footnote 4, at 377 F.2d 204, stating that the "ruling" in the case does not affect arbitration clauses providing for foreign venue. Considering the location of the footnote in the opinion, the "ruling" referred to appears to be that a provision for litigation abroad is void because a foreign court would apply different substantive rules than in COGSA. All the footnote seems to say is that an arbitration clause simply providing for a foreign venue does not present the same choice-of-law problem. It is certainly not a holding that an arbitration clause in a contract of adhesion, creating a limitation of liability for damages by virtue of a limited venue provision, will not be voided under a statute prohibiting such a limitation.

That interpretation would make the footnote impossible to reconcile with the textual statement in Indussa, on the page before the footnote, that the imposition of an inconvenient forum by contract does create a limitation of the liability for damages, particularly where the claim is small, because it "puts 'a high hurdle' in the way of enforcing liability..." 377 F.2d at 203. It is hard to believe that the court would permit, through a limited venue provision in an arbitration clause, a limitation of the liability for damages directly prohibited by COGSA, while refusing to permit it otherwise. That would elevate form over substance. It could hardly be reconciled with the savings clause in 9 U.S.C. §2, or with the equitable principles applicable to forum clauses in contracts of adhesion suggested by this Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 15, 17 (1972).

Aaacon's reference (31) to National

Equipment Rental v. Szukhent, 375 U.S. 311 (1964), is of course totally inapposite in this context, where a statute governs. Szukhent is also distinguishable in the common-law context, among other reasons, because it does not deal with the contract of a common carrier, to which fiduciary-like principles apply. [New York Central] Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 379-80 (1873). Moreover, The Bremen v. Zapata Off-Shore Co., supra, decided after Szukhent, specifically suggests that unfair forum-selection clauses will be invalidated in the adhesion contract setting.

As for Aaacon's reference (30) to Ex Parte 263, 340 I.C.C. 515 (1972), the Court of Appeals' discussion (26a-28a) makes its lack of relevance clear.

POINT VIII

THE F.A.A. CLEARLY PERMITS THE INVALIDATION OF AN ARBITRATION CLAUSE UNDER 49 U.S.C. §20(11) OR 317(a), SINCE THE SAVINGS CLAUSE OF 9 U.S.C. §2 PROVIDES THAT ARBITRATION CLAUSES ARE SUBJECT TO THE SAME STANDARDS AS ANY OTHER CONTRACT PROVISIONS.

Aaacon next argues that "The Language of the Federal Arbitration Act Precludes The Second Circuit's Conclusion" (Point heading at 31). Apparently, the language relied on is that in 9 U.S.C. §4 (32).

However, nothing in 9 U.S.C. §4 compels enforcement of an arbitration clause that is void under rules of law or equity that would void any other type of contractual provision. 9 U.S.C. §2, savings clause. Accordingly, nothing in 9 U.S.C. §4 precludes the conclusion that Aaacon's particular arbitration clause is void, as held by the court below, under 49 U.S.C. §20(11), because of its limited venue provision, and under 49 U.S.C. §317(a), because

the provisions for arbitration were rejected by the Interstate Commerce Commission when Aaacon attempted to include them in its tariff on file with the Commission (17a-18a, 24a-32a).

But, Aaacon argues, "The sole place where arbitration proceedings can be ordered is not any place specified in the agreement. Rather, it is solely the place of filing the petition to compel arbitration." (32). This argument is manifestly irrelevant. The question in the district court was not whether the court had the power to order arbitration outside the Eastern District of New York, which was the district in which Aaacon had filed its petition. Rather, the question was whether the court was going to order arbitration at all.

Aaacon also argues that it would have been entitled to arbitration in New York City in this case merely because it filed

its petition to compel arbitration there, even if its arbitration clause did not contain the limited venue provision (33-35). This argument cannot withstand analysis.

The shipper here resides in California. Accordingly, without the provision limiting venue to New York City, proper venue on Aaacon's petition to compel arbitration would not have been in New York but, rather, in California. 28 U.S.C. §1391(b). (28 U.S.C. §1391(b) would be applicable because the court's jurisdiction would be based on 28 U.S.C. §1337.) Cf. Swift Industries, Inc. v. Botany Industries, 297 F. Supp. 1056 (W.D. Pa. 1969)(proper venue on petition under 9 U.S.C. §4 governed by general venue statute.) Accordingly, an order dismissing or transferring the petition would have been entered under 28 U.S.C. §1406(a), not an order compelling arbitration.

Even if there were any technical reason why venue were proper in New York, the

court would not be obliged to proceed to order arbitration. The underlying claim of the shipper has no contacts with New York; there are no witnesses in New York; both the shipper and Aaacon are present in California; and California is obviously a more convenient forum than New York, without any prejudice to Aaacon, both for hearing the petition to compel arbitration and for any ensuing arbitration proceedings on the underlying claim (14a-15a, 34a-36a). Accordingly, the court would be free to dismiss the petition on the ground of forum non conveniens. As this Court stated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) at 508:

> ...[T]he plaintiff may not, by choice of an inconvenient forum, "vex", "harass", or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.

Alternatively, the court could transfer the carrier's petition under 28 U.S.C.

§1404(a) to a district court of appropriate venue. 28 U.S.C. §1404(a) provides for the transfer of any civil action "in the interest of justice" to a more appropriate district where it might have been brought. (A petition to compel arbitration may be brought in any district court where jurisdiction is proper. 9 U.S.C. §4.)

In view of the foregoing, it is apparent that, even if, as Aaacon assumes (31), "arbitration is lawful under 49 U.S.C. §20(11)", the mere filing by Aaacon in New York of a petition to compel arbitration would not entitle Aaacon to an order compelling arbitration if venue were inappropriate.

In any event, there is considerable question regarding Aaacon's assumption that its arbitration clause, even without the limited venue provision, would be lawful under 49 U.S.C. §20(11), a question briefed for the court below.

However, the court below did not reach this issue (36a), perhaps because it had already concluded that Aaacon's entire arbitration clause, even without the limited venue provision, was in any event void under 49 U.S.C. §317(a).

POINT IX

THE TARIFF SECTION'S REJECTION OF AAACON'S TARIFF CONTAINING THE VERY PROVISIONS HERE IN ISSUE RENDERED FURTHER USE OF THE PROVISIONS UNLAWFUL, SINCE THE REJECTION WAS A FINAL AGENCY DETERMINATION, NEVER APPEALED.

Aaacon contends that "The McCarthy Letter Was Not A Commission Order" (37). However, there can be no question that the rejection letter was the final act of the Commission by its duly designated official (26a), exercising the Commission's statutory obligation and authority to reject unlawful tariffs. Aaacon does not contend that any further action was necessary in

order to effect a tariff rejection under 49 U.S.C. §317(a). Its semantic argument over whether the rejection letter was an "order" is merely designed to cloak its renegade conduct in ignoring the rejection. As the Commission has stated, "We conclude that...the management of Aaacon...is not willing...to comply with the appropriate laws, rules, and regulations...." Aaacon Auto Transport, Inc. - Investigation and Revocation of Certificate, 124 M.C.C. 493, 509 (1976). (Emphasis added.)

Aaacon also contends that "The McCarthy Letter Was Superseded By Commission Tariff Filings" (39) and implies that the Commission approves of its arbitration clause (43). The Court of Appeals' opinion deals with many of these arguments (25a-32a). Here we need only point out that, even if a tariff containing the bill of lading provisions here in issue had been on file in June 1972, when the transaction between

Aaacon and the shipper occurred, that would not make the provisions enforceable. Boston & Maine Railroad v. Piper, 246 U.S. 439, 445 (1918).

But, Aaacon argues, "Since claims procedures were not required to be made part of tariffs, the June 15, 1971 letter was not a prohibiting act by the Commission" (41). However, by filing a tariff containing the precise claims practice here at issue, the carrier submitted the practice to the jurisdiction of the Commission, even if the filing were "gratuitous". (See, in that regard, Greyhound Lines, Inc. v. U.S., 1967 Federal Carriers Cases ¶81, 928 (D.C. Ill. 1967) upholding the Commission's assertion of jurisdiction over a tariff provision that did not have to be filed in the first place.)

Moreover, since the Commission clearly has the power to determine its own jurisdiction in the first instance, and since the

final agency directive reflected in the rejection letter was not a usurpation of its general subject-matter jurisdiction, the agency's assumption of jurisdiction in the particular case and on the particular issues involved must be treated according to standard principles of res judicata and collateral estoppel and cannot be collaterally attacked. Davis, Administrative Law Treatise §18.07 (1958) at p. 594-5; cf. 7 Moore ¶60.25[2] at p. 301-306 (1975), 1 Moore ¶0.60[5] at p. 611 (1975).

Consequently, the Court of Appeals was bound to give the rejection letter the legal effect required under 49 U.S.C. §317(a).

Nor could it make any difference what the grounds were for the rejection, since Aaacon could not collaterally attack it in the proceedings below.

Even though the rejection made further use of the provisions in issue unlawful under 49 U.S.C. §317(a), Aaacon might conceiv-

ably argue that the rejection should not stop it from litigating the validity of its arbitration provisions under §§20(11) and 316(b) if the rejection had been on grounds other than those two sections or for reasons other than those raised by the shipper here for holding the clause unlawful.

Aaacon indeed does again attempt to misrepresent and distort the two grounds for the rejection, claiming that it was based on (a) the absence of the arbitration provisions in the Uniform Bill of Lading and (b) a conflict with venue language of §20(11) deemed "expansive" (41).

Reference to the rejection letter, however, reveals that the reasons given were that the provisions enabled Aaacon to limit its liability for damages, prohibited under §20(11), and were unreasonable under §316(b) (cf. 24a-25a).

These are precisely among the reasons

the shipper here asserted the invalidity of the provisions. Having failed to seek administrative review of these issues in 1971, Aaacon should not have been permitted to litigate over them in the courts.

CONCLUSION

SINCE THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY OTHER DECISION, AND SINCE THE COURT'S RESOLUTION OF THE ISSUES IS IN COMPLETE ACCORD WITH THE PLAIN MEANING OF THE STATUTE, THE EXPRESSED LEGISLATIVE INTENT, SETTLED PRINCIPLES, AND THE VIEWS OF THE I.C.C., THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

HELEN FRANCES W. LEHRICH
Attorney for Respondent
60 East 9th Street
New York, New York 10003

WALTER WILLIAMSON, Of Counsel,
WILLIAMSON & WILLIAMSON
225 Broadway
New York, New York 10007
(212) 233-8080